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JUDICIAL SCRUTINY IN PUBLIC FORUM CASES: MISPLACED TRUST IN THE JUDGMENT OF PUBLIC OFFICIALS

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INTRODUCTION

The problem of resolving the inevitable conflicts between public demonstrations and governmental interests in the orderly use of public forums exists in every democratic society. For each group of demonstrators that wishes to assemble on a street corner and disseminate its ideas, there is always a public official responsible for assuring that the demonstration will be peaceful and will not disrupt competing activities. Fair and efficient resolution of such conflicts requires development of a rational and stable regulatory framework. Presumably, such a framework generates decisions which fairly and consistently balance interests in communication against interests in social order; it also minimizes ad hoc regulatory decisions which are a product of pressures and biases of the moment.

Since the resolution of conflicts between speech and regulatory interests requires a balancing of important competing social and constitutional policies, courts inevitably assume an extremely important role in the decision-making process. The United States Supreme Court has played the dominant role. It has developed the "time, place, and manner" doctrine as a guide to regulation of speech activities in public forums.[1] The doctrine embodies the

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1. One of the first cases to articulate the "time, place and manner" doctrine was Cox v. New Hampshire, 312 U.S. 569, 575-76 (1940), where the Court held that a New Hampshire statute prohibiting a parade or procession upon a public street without a special license did not contravene constitutional rights of freedom of speech and assembly. The Court construed the statute to limit the state's licensing authority to considerations of whether the "time, place, and manner" of the proposed assembly would "unduly disturb" other public uses of the streets. For further discussion of *Cox*, see *infra* notes 37-40 and accompanying

Court's view of an effective approach which balances the relevant competing interests. First, the doctrine protects the exchange of ideas in public places by prohibiting regulation that censors or otherwise regulates the communication of ideas because of official objections to content. Second, it authorizes government officials to impose content-neutral regulations on demonstrations to protect significant state interests unrelated to speech.[2] Thus, regulations "justified without reference to the content of the regulated speech" can be imposed on forum activites to assure that the activities are orderly and do not unduly interfere with competing uses of the same or nearby locations.[3] This doctrine is usually cast in the following terms: "[A]ctivities . . . protected by the First Amendment are subject to reasonable time, place, and manner restrictions."[4]

The generally accepted view among constitutional scholars is that judicial application of the time, place, and manner doctrine is characterized by two different levels of judicial scrutiny.[5] At the higher level of scrutiny, any restriction that delegates unlimited discretion to forum regulators is presumed to be unconstitutional.[6] The Court presumes, without requiring actual proof, that such restrictions will be used discriminatorily or unnecessarily to burden the flow of communication.

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text.

For a discussion of the doctrine which evolved from *Cox*, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 10-29 (consideration of the time, place, and manner of a proposed assembly authorizes regulation only of its timing, and not the content of what is said; the courts must carefully weigh the impact of the regulation on the right of free speech); *see also* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1486-92 (1970) (criticism of *Cox* for the discretion left with public officials who need not determine anything more concrete than that a proposed assembly will "unduly" disturb public convenience, and who may require consequent changes in the time, place, and manner of the assembly); Stone, *Fora Americana*, 1974 SUP. CT. REV. 233, 239-56 (*Cox* decision became part of a workable theory of use of the public forum which succeeded for two decades by emphasizing regulation over prohibition).

2. Kalven, *supra* note 1, at 26-28.

3. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981).

4. *Id.* at 647.

5. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-2 to 12-6 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-90 (1975). *Cf.* Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (suggesting the emergence of an intermediate level of scrutiny in equal protection cases).

6. Lovell v. City of Griffin, 303 U.S. 444, 450-52 (1938).

In contrast, forum restrictions containing standards which confine official discretion are subjected to a much lower level of judicial scrutiny.[7] At the lower level of judicial scrutiny, any restriction characterized by specific language aimed at protecting nonspeech regulatory interests is presumed to be constitutional. This presumption frees the state from any obligation to produce specific proof of actual or anticipated harm to regulatory interests in order to justify a restriction. A speaker who wishes to challenge such a restriction bears the burden of proving that it is discriminatory or arbitrary. For example, a restriction which by its terms specifically prohibits "leafletting" in intersections of busy streets in order to avoid traffic disruption is presumed valid without proof by the state that the leafletting *actually* interferes with traffic.[8]

Although judicial scrutiny in public forum cases is often characterized as extremely high or extremely low, the Article will demonstrate that judicial scrutiny is more accurately characterized as falling on a continuum. It will show that the Court varies the level of scrutiny to accommodate the particular facts under review. The public forum cases will be looked at individually and, as a result, several identifiable levels of scrutiny will emerge. Taken together, these different levels fall on a continuum. The continuum is generated by the Court's propensity to employ maximum levels of scrutiny when reviewing a regulation which is an actual or potential tool of censorship; as evidence accumulates that a forum regulation has content-neutral goals, the level of scrutiny declines accordingly.

No matter what level of scrutiny is employed in an individual case, the critical inquiry is whether a regulation is content-neutral. If the regulation is not content-neutral because it authorizes or implements a policy of censorship, the Court presumes that the censorship will in fact occur.[9] The Court therefore rejects the regulation as untrustworthy, and automatically overrules any official claims that it serves valid governmental interests.[10] Conversely,

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7. Professor Tribe characterizes this as the equivalent of minimal due process scrutiny. L. TRIBE, *supra* note 5, § 12-2.

8. United States Labor Party v. Oremus, 619 F.2d 683, 687-88 (7th Cir. 1980).

9. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.")

10. Although none of the scholars who have examined the time, place, and manner doctrine have explicitly done so in terms of the trustworthiness of different regulatory deci-

when a regulation appears to be content-neutral, the Court presumes that the censorship will not occur. It therefore sustains the regulation as a trustworthy effort to protect legitimate governmental interests.

The purpose of this Article is to challenge the view that content-neutral time, place, and manner restrictions protecting state interests provide the trustworthy protection of speech interests that the Supreme Court appears to assume. The Article demonstrates that the Supreme Court's formulation and application of the time, place, and manner doctrine frequently undercuts speech interests by authorizing remarkably broad, unsupervised discretion by forum regulators.[11] Furthermore, frequent use of the low levels of judicial review authorized by the time, place, and manner doctrine for examination of content-neutral restrictions allows and even encourages forum regulators to favor regulatory interests over speech interests. Low levels of scrutiny particularly insulate the strong inclinations of forum regulators to construct restrictions that disadvantage controversial communication. Thus, the current mode of judicial scrutiny places no significant judicial restraint on the natural tendency of forum regulators to impose unnecessary content-neutral restrictions on any activities which they believe might cause trouble or violence.

The Article concludes that the Supreme Court's approach to the review of forum restrictions should be modified. It proposes

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sions, they seem to assume implicitly that trustworthiness is an essential element of judicial analysis. *See, e.g.*, Ely, *supra* note 5, at 1496-1502. The assumption of trustworthiness of legislative decision-makers seemed central to the holding in United States v. O'Brien, 391 U.S. 367 (1968), which upheld a law prohibiting the destruction of draft cards against a first amendment challenge. In *O'Brien*, the Court reluctantly sustained a legislative policy judgment that possession of draft cards was essential to the administration of the selective service system—even though the judgment was not entirely convincing. Because the Court found that the Government's claim of need for the law was plausible, it felt constrained to trust the wisdom of the legislative process which enacted the law. *Id.* at 376-77, 381.

11. The term "forum regulators" includes all public officials including administrators and legislators who enact or enforce restrictions on use of public places for public communication. Both legislators and administrators are confronted with the same policy questions when imposing restrictions on the use of forums. They must design laws and impose restrictions that protect state property, governmental operations, and public safety. While the legislator enacts a law "for all time" and a regulator is more concerned with individual cases, both engage in the same process of reconciling competing interests in a fashion that protects those interests that they consider most important. Because they are executing the same task—making decisions governing use of public forums—they are ultimately subject to similar pressures and incentives.

that the Court abandon its erroneous assumption that content-neutral restrictions are likely to embody a reasonable balance of competing interests, and recommends, alternatively, that the Court employ a mode of review which takes into account official tendencies to be overprotective of regulatory interests. It also proposes that a model for such scrutiny already exists in the methodology devised by the Court to test for impermissible discrimination against particular ideas.

I. THE DEVELOPMENT OF A CONTINUUM OF SCRUTINY LEVELS IN PUBLIC FORUM CASES

A. *Heffron: The Paradigm of Low Level Scrutiny*

A useful starting place in this inquiry is *Heffron v. International Society for Krishna Consciousness*,[12] one of the Court's fullest expositions of the time, place, and manner doctrine. In *Heffron*, the International Society for Krishna Consciousness (ISKCON), a Hindu religious sect commonly known as the Hari Krishnas, sought to distribute and sell literature and solicit donations on the fairway at the 1977 Minnesota state fair. These activities were regarded by the Krishnas as an integral part of their religious practice.[13] A Minnesota state fair regulation prohibited such activities in all locations at the fair except at fixed booths which could be rented from authorities on a first-come, first-served basis.[14] The only peripatetic activity on the fairway which the regulation was construed to permit was face-to-face proselytizing of fairgoers by the Krishnas; no literature could be given away or sold,

12. 452 U.S. 640 (1981). Law review commentary on this case consists of Note, *Heffron v. ISKCON: The Tenuous Touchstone—A Step in the Wrong Direction?* 19 HOUS. L. REV. 325 (1982); Note, *"Booth" Rule and State Fair Upheld a Valid Time, Place, and Manner Restriction on Freedom of Expression*, 12 CUM. L. REV. 693 (1982); Note, *Continued Erosion of a Fundamental Right*, 9 FLA. ST. U. L. REV. 682 (1981); Note, *Time, Place, and Manner Regulations of Expressive Activities in the Public Forum*, 61 NEB. L. REV. 167 (1982); *Heffron v. International Society for Krishna Consciousness, Inc.: Reasonable Time, Place, and Manner Restrictions*, 15 J. MAR. L. REV. 543 (1982); Note, *Heffron v. International Society for Krishna Consciousness, Inc.: A Restrictive Constitutional View of the Proselytizing Rights of Religious Organizations*, 9 PEPPERDINE L. REV. 519 (1982).

13. 452 U.S. at 644-45.

14. *Id.* at 644. The Court's opinion sets out the relevant portion of the state fair Rule 6.05 promulgated by the Minnesota Agricultural Society, a public corporation, in the following terms: "[S]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly-licensed location shall be a misdemeanor." *Id.* at 643.

nor donations solicited.[15]

Prior to the opening of the fair, the Krishnas challenged the constitutionality of the regulation by asserting that the regulation violated rights guaranteed by the first amendment.[16] Minnesota officials asserted that the restriction was necessary; they argued, among other things, that it protected against disruption of pedestrian traffic on the busy fairground.[17]

In an opinion by Justice White, the Supreme Court upheld the regulation and concluded that, on its face and as applied, it was an appropriate exercise of state power. On an extremely sketchy record, Justice White concluded that the special function of a state fair—a temporary event which attracts a very large number of people each day—justified enforcement of the rule.[18] In reaching this conclusion, he articulated a three-part test which incorporated the policies articulated in prior public forum cases: "[1] that they are justified without reference to the content of regulated speech, [2] that they serve a significant governmental interest, and [3] that in doing so they leave open ample alternative channels for communication of information."[19] The rest of his opinion was devoted to showing that the restriction on the Krishna activites passed muster under the test.

Justice White's initial analytical step was to determine whether the restriction was intended to be a tool of censorship. The opinion concluded: "The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[20] Justice White also concluded that the regulation was being construed in a nondiscriminatory fashion because "[t]he method of allocating space is a straightforward first-come, first-served system."[21]

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15. *Id.* at 643-44.

16. *Id.* at 644-45.

17. *Id.* at 645-46. The state raised other justifications for the restriction, including protection of the fair patrons against fraudulent solicitations, deceptive or false speech, undue annoyance, and harrassment. The Court did not consider these assertions. *Id.* at 650 n.13.

18. *Id.* at 654.

19. *Id.* at 647-48 (quoting from Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

20. 452 U.S. at 649.

21. *Id.*

The next step in the inquiry was to determine whether the restriction was justified by a legitimate state interest unrelated to speech. The large crowd attracted to the 125 acre fairground each day was a factor sufficient to persuade the Court that "the State's interest in the orderly movement and control of such an assembly of persons is a substantial consideration."[22] Moreover, because the site in question was a fairground, the Court explicitly refused to apply legal principles applicable to regulation of public streets and parks. Justice White maintained that the need for restrictions on a fairground was greater than the need for restrictions on use of a public street. "[A] street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[23]

Finally, the Court concluded that the restriction did not unnecessarily constrict the flow of communications because it left open alternative channels of communications with the intended audience and thus did not totally isolate the Krishnas from fair patrons: "[T]he Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum."[24] The Krishnas remained free to proselytize orally on the fairgrounds. They also remained free to rent a booth as all exhibitors had been required to do.[25]

In deciding the case, the Supreme Court employed an extremely low level of scrutiny. The Court presumed that leafletting and other such activities would inflict harm on state interests of sufficient magnitude to justify the restriction. This presumption was made even though the state put no evidence into the record showing that the prohibited activities would actually have a tangible impact on the flow of people on the fairways.[26] Since there was no evidence of discrimination and because the restriction was not unduly arbitrary or burdensome, the Court was satisfied that fair

22. *Id.* at 650.
23. *Id.* at 651.
24. *Id.* at 655.
25. *Id.*
26. *Id.* at 650.

officials had made a sound administrative judgment.

Employment of a low level of scrutiny enabled the *Heffron* Court to ignore the strong indication in the record that the restriction on the leafletting might well have been unnecessary. This indication emerged from the state's choice to prohibit leafletting while permitting face-to-face proselytizing. Justice Blackmun's concurring and dissenting opinion was quick to point out the contradiction inherent in such a choice:

> The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. For this reason, literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds.[27]

Yet, rather than carefully considering whether this problem reflected an arbitrary or discriminatory choice, the majority merely assumed that the judgment of fairground administrators was a trustworthy reconciliation of speech and regulatory interests.

Heffron was not written on a clean slate, however. As indicated by the following discussion, review of the levels of judicial scrutiny used in pre-*Heffron* public forum decisions shows that *Heffron* is respresentative of the way the Court normally treats public forum cases. A similarly low level of scrutiny has been used in many prior decisions.

B. *The Early Cases: Defining the Extremes of the Continuum*

The policy of content-neutrality is the centerpiece of the jurisprudence of public forums. It emerged as the centerpiece in a series of cases in the late 1930s and early 1940s. In those cases, the Supreme Court assessed the facial validity of permit laws to see if they contained standards sufficiently precise to discourage forum regulators from arbitrarily denying permits.

1. *The unconstitutionality of "standardless" regulation.* In *Lovell v. City of Griffin*,[28] the Court overturned the conviction of a Jehovah's Witness for leafletting without a permit because the applicable ordinance banned circulation of all literature within city limits without a permit from the city manager.[29] The ordinance

27. *Id.* at 665.
28. 303 U.S. 444 (1938).
29. *Id.* at 447, 451.

contained no concrete standards which specified when the granting or denying of a permit would be appropriate.[30] In a brief opinion, the Supreme Court found that the absence of such standards in the ordinance gave unlimited power to the city manager to grant or deny permits whenever he wished: "There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants or the misuse . . . of the streets."[31]

A year later, in *Hague v. CIO*,[32] the Court voided a public assembly permit ordinance which the mayor of Jersey City used as part of his broad scale efforts to disrupt union organizing activities.[33] The ordinance was held unconstitutional because, as in *Lovell*, it lacked specific standards to limit the exercise of official discretion. Justice Roberts, writing for a plurality, explained that the ordinance "does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbance or disorderly assemblage'."[34] He explained that the vice of such a standardless law was its potential use as an "instrument of arbitrary suppression of free expression of views on national affairs. . . ."[35]

Thus, the permit laws in *Lovell* and *Hague* were rejected for lack of standards. This rejection evidenced the strength of the Supreme Court's distrust of discretionary decision making by public officials in the context of forum regulation. In *Lovell* the Court was so convinced that unconfined official discretion would lead to censorship that it did not allow enforcement of standardless licensing provisions. This was done in spite of the fact that Alma Lovell had not even attempted to apply for the required permit. Although the

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30. *Id.* at 450-51.

31. *Id.* at 451. It should be noted that the words "or littering" were deleted from the quotation and an ellipsis was inserted. The deletion was made to highlight the role of *Lovell* as a case voiding laws that delegate unlimited discretion to regulators. Schneider v. State, 308 U.S. 147 (1939), decided one year later, held that fear of littering was not a justification for a ban on leafletting even if the statute or ordinance were clearly drawn. *See infra* text accompanying notes 43-48.

32. 307 U.S. 496 (1939).

33. *Id.* at 504-06.

34. *Id.* at 516 (quoting from the challenged ordinance).

35. *Id.*

Court might have confined itself to a holding that an unconstitutional *denial* of a permit was the only valid defense to her prosecution, the Court chose instead to invalidate the ordinance on its face. It apparently viewed the mere threat of censorship as sufficient to preclude enforcement of a standardless law.

Similarly, in *Hague* the Supreme Court subjected the Jersey City ordinance to a level of scrutiny which presumed that a standardless ordinance would be used as a tool of censorship. Notwithstanding provisions in the ordinance that authorized a permit denial only if officials believed it necessary to prevent a riot, disturbance, or disorderly assemblage,[36] the Court demanded greater specificity. It insisted on an ordinance which required that determinations of the potential for riots or disturbances turn on objective facts rather than the subjective beliefs of the forum regulator. It was unwilling to trust regulatory decisions which could not be measured against objective standards as a check against censorship.

The Court did not have to take such a speech-protective stance. For example, it might have concluded that the ordinance was valid because an administrator's indisputable familiarity with the relevant facts about a particular demonstration put him in a special position to make a reasoned judgment about any potential for disorder that it presented. Instead, the Court presumed that administrative reliance on the regulation's subjective decision-making standards meant that public officials were going to unnecessarily impede the free flow of communication or exercise their power discriminatorily. Thus, by automatically striking down such standardless laws, the Court established a presumption that such laws were tools of censorship.

2. *The emergence of "content-neutral" regulation as a constitutionally acceptable alternative.* Even though the Court presumed censorship whenever reviewing standardless laws like those in *Lovell* and *Hague*, the parameters of judicial review in public forum cases were still far from clear. The Court had not yet affirmatively identified specific statutory language that it felt would provide sufficient protection against the threat of censorship and would also accommodate competing regulatory interests. The

36. *Id.*

Court took this important step in *Cox v. New Hampshire*.[37]

In *Cox*, several demonstrators had been prosecuted for parading without applying for a permit, in violation of the New Hampshire permit statute. The defendants argued that the statute was unconstitutional because it lacked adequate standards. The United States Supreme Court disagreed. The statute was approved because its terms had been construed by the New Hampshire Supreme Court to require the granting of permits to demonstrators subject only to "considerations of time, place, and manner so as to conserve the public convenience."[38] The Court explained that the New Hampshire court's construction of its permit law established a permit scheme that "provided authorities with notice in advance [of a demonstration] so as to afford an opportunity for proper policing,"[39] yet "prescribed 'no measures for controlling or suppressing the publication on highways, of facts and opinions, either by speech or by writing'."[40]

The crucial contribution of the *Cox* decision was its identification of the terms "time," "place," and "manner" as the content-neutral measures of the validity of a permit law.[41] If those terms or their analogues were present in the text of a law or were read into it by judicial construction, *Cox* made clear that it would pass constitutional muster. Beyond that, however, *Cox* did nothing to indicate how the Court intended to apply the time, place, and manner framework to specific factual contexts. Even though a conflict between content-neutral regulatory interests and competing speech interests was virtually inevitable, *Cox* gave no guidance as to how carefully the Court would scrutinize any particular time, place, or manner restriction. Instead, it left regulators to their own devices when enforcing content-neutral restrictions.

C. *Completing the Continuum: Intermediate Variations in the Levels of Scrutiny*

A response to the deficiency in *Cox* was not long in coming. In a series of decisions which began during the years just prior to World War II and culminated with *Heffron*, the Court has sketch-

37. 312 U.S. 569 (1941).
38. *Id.* at 575-76.
39. *Id.* at 576.
40. *Id.* at 575 (quoting from State v. Cox, 91 N.H. 137, 16 A.2d 508, 514 (1940)).
41. *See* Kalven, *supra* note 1, at 25-27.

ed its view of appropriate implementation of the time, place, and manner doctrine. These cases demonstrate the Court's distinct predisposition to employ lower levels of scrutiny when a forum restriction is not considered discriminatory and is not found to impose a patently unreasonable burden on communication.[42] Such tests are usually not difficult for forum regulators to meet. In these cases the Court has usually been willing to accept unsupported official claims of need for specific forum restrictions as trustworthy.

1. *Streets and Parks.* The earliest cases to indicate how contemporary public forum restrictions would be reviewed actually predated *Cox* by a couple of years. The first indication had appeared in *Hague v. CIO.*[43] There, Justice Roberts articulated the dictum that has become the keystone in the law of public forums. In rejecting a government claim that streets and parks were the equivalent of private property, he stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation be abridged or denied.[44]

Although the dictum employs property notions, it actually stands for the proposition that communication in commonly accessible places like thoroughfares, streets, and parks is simply an interest too important to be completely prohibited. In articulating this position, Justice Roberts gave notice to government officials that the Court was not passively going to accept any justification

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42. The Supreme Court, of course, evaluates forum restrictions against the three tests articulated in *Heffron. See supra* text accompanying note 19. However, the Court appears to determine whether those tests have been met by assessing the extent to which any departure from any one of the tests seems excessive. As suggested by the Court's inattention to the ban on leafletting in *Heffron*, if noncompliance seems insubstantial, the Court is generally inclined to sustain the restriction without employing close scrutiny. *See supra* notes 12-27 and accompanying text.

43. 307 U.S. 496 (1939).

44. *Id.* at 515-16.

for restricting speech. Instead, officials were put on notice that there would be some cases in which the Court was going to make its own assessment by weighing government claims against speech interests.

A short time later the Court relied upon the *Hague* dictum to rationalize its decision in *Schneider v. State*.[45] The *Schneider* decision invalidated city-wide bans on leafletting by refusing to presume that they were necessary to prevent littering. The Court reached its conclusion in several steps. Initially, it accepted, without serious examination, the government claim that litter control was a legitimate governmental goal.[46] More importantly, it followed the thrust of the *Hague* dictum by stating that the streets are "appropriate public places" for the dissemination of information and opinion.[47] Since streets and parks play a special role as public forums, the Court concluded that a city-wide ban on leafletting was an unnecessarily restrictive way to protect the valid state interest in avoiding littering:

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.[48]

Schneider is instructive because of the level of scrutiny the Court employed. While the level of scrutiny was less than that used in the *Lovell* and *Hague* cases voiding laws that lacked clear standards, the level seemed to be significantly more than no scrutiny at all. The Court found itself confronted with a total ban on leafletting on public streets and parks, sites where a very substantial portion of such activity could be reasonably expected to occur if leafletteers sought to reach a sizable audience. If littering considerations would support banning leafletting on such sites, then the problem of littering could be used to justify a ban on leafletting at

45. 308 U.S. 147 (1939).
46. *Id.* at 160-61.
47. *Id.* at 162.
48. *Id.*

virtually any site. Faced with such an obvious and extreme burden on communications, the Court responded by employing a comparatively high level of scrutiny which avoided a presumption that all content-neutral restrictions imposed on the use of streets for routine communication activities were valid. It treated that mere assertion of need by the state as insufficient to sustain such a law. In place of such an assertion, it appeared that the state would have to actively persuade the Court that a more substantial interest than littering was at stake—one of sufficient magnitude to justify denial of access to a forum of great importance to protestors of all ideological stripes.

It should also be noted that the mode of scrutiny in *Schneider* differed from that employed in cases such as *Lovell*, in which the Court automatically voided statutes that lacked specific standards. The *Schneider* Court did not reject all laws that amounted to bans. Rather, it confined its rejection to flat bans on use of public streets and parks. The possibility that flat bans would be upheld on other sites if the state made an adequate showing of need was left open by implication. This important implication was made clear by the Court's acknowledgement that regulations banning leafletting *in* intersections might well receive different treatment: "[A] person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic. . . ."[49] The level of scrutiny in *Schneider* contrasted with that used in the standardless discretion cases. In those cases, no justification put forward by the state would ever be sufficient to persuade the Court to uphold an inadequately drafted statute.

2. *Outside jails and state courthouses.* The particular level of scrutiny employed in *Schneider* has not been applied in subsequent cases reviewing bans on speech activities on sites other than public streets. The Supreme Court has opted for either lower or higher levels of scrutiny, depending on its view of the severity and the content-neutral quality of the restriction before it. As will be shown below, when the Court has reviewed restrictions imposed on the use of public property which lacks the qualities of streets and parks, the level of scrutiny has declined considerably. This is because, unlike the *Schneider* inquiry into the actual need for the

49. *Id.* at 160.

flat ban as opposed to alternative restrictions, judicial review of flat bans on access to certain sites for demonstrating has turned on the presumption that the regulated communication activities will harm state interests. Inquiry has tended to stop at that point. No inquiry into the presence of actual harm or the possibility of enforcing less restrictive means has followed.

For example, in *Cox v. Louisiana* [hereinafter *"Cox II"*][50] the Supreme Court upheld a state statute banning picketing or parades in or near a state courthouse "with intent of interfering with [the] administration of justice or [of] influencing any judge, juror, witness or court officer. . . ."[51] On its face, the statute reached virtually any demonstration the purpose of which was to express an opinion about a pending proceeding, regardless of whether there was an actual or threatened impact on that proceeding.[52] Although the Court viewed the regulation as the equivalent of a flat ban on all picketing near courthouses, it was still upheld. In doing so, the Court employed an extremely low level of scrutiny in deciding the case. The inquiry was largely confined to determining that the statute protected a valid state interest.[53] Upon concluding that the interest was valid, the Court presumed that speech activities near courthouses created such a threat of interference with judicial proceedings that a broad ban was appropriate. The Court approved the regulation even though it extended to activities that might have no direct impact on participants in particular proceedings: "[A] State may protect against the *possibility* of a conclusion by the public . . . that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process."[54]

A year later in *Adderly v. Florida*,[55] the Court employed a similarly low level of scrutiny. The Court upheld the trespass convictions of protestors for assembling on the grounds outside a jail. The convictions arose out of a protest against the previous arrests of failed student demonstrators. The sheriff in charge of the jail

50. 379 U.S. 559 (1965). Commentators generally refer to this case as *"Cox II"* to distinguish it from Cox v. Louisiana, 379 U.S. 536, a case which was decided on the same day as *Cox II*, and which arose from the same factual setting.

51. 379 U.S. at 560, 564.

52. *Id.* at 564.

53. *Id.* at 561-64.

54. *Id.* at 565 (emphasis added).

55. 385 U.S. 39 (1966).

ordered the protestors to leave. When they refused, they were arrested and convicted for trespass.[56] The low level of the Court's scrutiny is clear because the judicial inquiry was primarily confined to determining whether the sheriff's decision had been an effort to discriminate against the views of the demonstrators. Finding no discrimination present, the Court assumed that because of the specialized purposes of jail facilities, the state had a sufficient interest in jail administration to justify the exclusion of all demonstrations from the grounds. This assumption, while not clearly articulated in the opinion, was revealed in the Court's observation that "[t]he State, no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully dedicated."[57]

The low level of review employed both in *Cox II* and in *Adderly* appears to have been the product of two considerations. First, the Court was convinced that neither restriction created the potential for officially authorized censorship because neither was inherently discriminatory and both were even-handed efforts to protect the operations of state institutions. Second, the Court was apparently persuaded that state courthouse and jailhouse grounds were such atypical places for demonstrations that a flat ban on demonstrations at such sites would not significantly interfere with demonstrator access to their audiences. Demonstrators still had forums such as streets and parks available to them.[58] Moreover, in the absence of evidence of intent to censor, there appeared to be no suspicious regulatory motives. As a consequence, the Court

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56. *Id.* at 44-46.

57. *Id.* at 47.

58. Another example of the Court's relatively consistent emphasis on protecting speech in forums that it regards as traditional sites for protest appears in Edwards v. South Carolina, 372 U.S. 229 (1963). There the Court overturned breach of peace convictions because protestors peaceably assembled at the South Carolina State House grounds—a location the Court viewed as a proper place for protests:

> It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States (citations omitted). The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly "prohibited Negro privileges in this State." They peaceably assembled at the site of the State Government and there peaceably expressed their grievances to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.

Id. at 235.

readily assumed that each restriction represented a sound balance between speech interests and regulatory interests.

3. *Public schools.* If the scrutiny used in the cases reviewing restrictions on demonstrations near jails and state courthouses was low, it took a sharp jump upward in a case reviewing restrictions on student speech in public schools. In *Tinker v. Des Moines Independent Community School District*,[59] the Supreme Court overturned a decision to suspend students for wearing armbands at school as a symbolic protest against the war in Vietnam. The suspensions had been imposed by school officials who feared that display of the antiwar armbands would provoke trouble among other students.[60] The Supreme Court voided the suspensions because antiwar ideas had been singled out by school officials who failed to produce palpable evidence to support their fear of disruption.[61]

The *Tinker* Court reached its holding in two steps. First, it concluded that in spite of the school officials' need for comprehensive authority "to prescribe and control conduct,"[62] schools were a proper place for communication of ideas.[63] Second, the Court concluded that school officials could not regulate school premises as though they were private property subject to the unrestrained discretion of administrators: "[A school] is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property."[64]

Having taken these steps, the Court proceeded to employ a comparatively high level of judicial scrutiny. The Court imposed a

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59. 393 U.S. 503 (1969).

60. *Id.* at 508, 510.

61. *Id.* at 511.

62. *Id.* at 507.

63. The Court was quite emphatic about this point, stating:

> The principal use to which the schools are dedictated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among these activities is personal intercommunication among students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.

Id. at 512.

64. *Id.* at 509. The Court seemed to abandon private property notions in public forum cases via the dictum in Hague v. CIO, 307 U.S. 496, 514-16 (1938) and the rationale in Jamison v. Texas, 318 U.S. 413 (1943), which voided bans on leafletting in public streets because private property law was inappropriate. The Court's preoccupation with private property concepts reemerges periodically; *see, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966).

significant burden of justification on school administrators to demonstrate that the restrictions on particular communications could be supported by objective evidence. The standard was specified in the following terms:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[65]

The level of scrutiny in *Tinker* presented a sharp contrast to that used in the courthouse and jail curtilage cases.[66] Instead of assuming that the restriction was needed and that harm would occur to school activities in its absence, the Court did precisely the opposite. It presumed that the restrictions inflicted unnecessary harm on communications activities and placed a burden on the state to prove otherwise.

The comparatively high level of scrutiny in *Tinker* seems to be explained by the Court's conclusion that the restriction banned communication of a single idea. The Supreme Court was thus confronted with a restriction that had the earmark of censorship and, therefore, declined to presume that the restriction struck a sound balance between speech and regulatory interests. Instead, school administrators would have to prove they were exercising sound judgment:

> [A] particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.[67]

A distinctive feature of *Tinker* was the particular character of the presumption it created. The presumption against the validity of the state regulation was more limited than that which had been applied to review of statutes lacking clear standards; yet it was

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65. 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

66. *See supra* notes 50-58 and accompanying text.

67. 393 U.S. at 510-11.

more rigorous than the *Schneider* balancing standard.[68] In the standardless discretion cases, the Court had presumed that speech opportunities were unduly threatened.[69] In *Schneider*, the Court assessed a precisely drawn restriction by balancing the expected impact of the restriction, and even discussed a less restrictive alternative that might be substituted.[70] In contrast to both, *Tinker* employed a presumption of unconstitutionality which could only be rebutted by an actual showing that the communication would inflict harm on a valid state interest.[71] While the Court made clear that school officials could restrict speech where necessary, they could only do so if they could actually show that the restriction was necessary to avoid disruption of the educational process.[72]

4. *Military installations.* In the years following *Tinker*, the Court decided *Flower v. United States*[73] and *Greer v. Spock*.[74] Both decisions governed speech activities by private citizens on military installations. At first glance these cases seem to employ very different levels of scrutiny. *Flower* appears to presume that the state justifications were suspect; *Spock* appears to presume that the state justifications were valid. Upon closer examination,

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68. *See supra* notes 45-49 and accompanying text.

69. *See supra* notes 28-36 and accompanying text.

70. 308 U.S. at 162. The Court suggested punishing litterers as an alternative.

71. The obvious parallel to the Court's approach to deciding *Tinker* is the "clear and present danger" test in Brandenburg v. Ohio, 395 U.S. 444 (1969). Like *Brandenburg*, *Tinker* permits regulation of the content of communiction when the purpose of the regulation is to prevent speech from creating a tangible physical interference or harm. The regulation is found constitutional because the harm it is supposed to prevent is the actual disruption of the operation of state institutions. The Court apparently does not regard this as censorship because the focus of the regulation is on preventing the harm rather than preventing the communication. The restriction on speech is theoretically incidental to avoidance of the harm.

72. In Board of Educ. v. PICO, 452 U.S. 853 (1982), the Court appears to have left the *Tinker* approach intact in a school setting. There a majority of the Court held that the decision of school board members to remove books from the school library that they found "objectionable" and "improper fare for students" was subject to judicial review. *Id.* at 871-72. The Court concluded that book removal could be sustained only if the trial record showed that school officials did not remove the books because of disagreement with consitutionally protected ideas in those books. *Id.* However, the Court's commitment to *Tinker* is clouded by the fact that Justice White, who provided the fifth and deciding vote, concurred purely on the question of whether the evidence was sufficient to support a summary judgment. He explicitly refused to address the first amendment question. *Id.* at 883-84 (White, J., concurring).

73. 407 U.S. 197 (1972).

74. 424 U.S. 828 (1976).

however, one can see that both cases were decided using essentially the approach that had begun to emerge in prior public forum cases. The superficially different levels of scrutiny reflected factual distinctions between the two cases. These factual differences led the Court to treat one case as involving speech in public streets and the other case as involving speech on the interior of a military base, which the Court concluded was very different from a public forum.

In *Flower v. United States* the Supreme Court overturned a conviction of a Quaker for distributing antiwar leaflets on a government-owned street running through the Fort Sam Houston Military Base.[75] The Army contended that leafletting on a military base could be prohibited at the discretion of the base commander as an incident of the administrative needs of a military base. In a per curiam opinion, the Court summarily rejected this contention. A review of the facts in the trial record showed that the street in question was open to and routinely used by the general public as a public street.[76] The Court concluded that the street in the military base was the equivalent of any other public street, and leafletting was, therefore, entitled to the same constitutional safeguards that it received on other public streets.[77]

In *Greer v. Spock*, the Court went to great lengths to confine the *Flower* decision to its facts. There it upheld a ban on partisan political speechmaking and demonstrating on sites inside the Fort Dix Military Reservation, and a ban on distribution of literature without prior approval of the commanding general. Central to the Court's reasoning was its conclusion that the restriction on partisan speech was directed at protecting state interests unrelated to the viewpoint of the communication and, therefore, affected all partisan communication identically, regardless of the identity of the political party or the candidate.[78] In the Court's words, the ban on speeches and demonstrations was "a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind."[79]

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75. 407 U.S. at 198.
76. *Id.*
77. *Id.* at 198-99.
78. 424 U.S. at 838-39.
79. 424 U.S. at 839.

The military restriction on leafletting received similar treatment.[80] Because the restriction was specifically drafted to prohibit communications which would have harmful effects on the operation of the military, the Court concluded that it was confined to protecting regulatory interests unrelated to content:

> [The regulation] does not authorize Fort Dix authorities to prohibit the distribution of conventional political campaign literature. The only publications that a military commander may disapprove are those he finds constitute "a clear danger to [military] loyalty, discipline or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical—even unfairly critical—of government policies or officials. . . ."[81]

The Court in *Flower* and *Spock* focused its analysis on two factors: the lack of discrimination and the degree of similarity of each location to a public street. The focus on these factors made the contrasting levels of review consistent with the Court's approach to judicial review in prior public forum cases. In *Flower* the Court rested its ruling on the fact that the street on the military base was indistinguishable from any other public street.[82] Thus, the *Flower* majority treated the case as merely another ban on leafletting on public streets. Under such circumstances it was predictable that the Court would employ a level of scrutiny commensurate with that employed in reviewing the flat ban on leafletting in *Schneider*. Since a public street is generally regarded as one of the most traditional and important forums, the fact that the street passed through a military base was found to be an insufficient ground to justify overriding speech interests.

Spock presented a different kind of case. There the speakers sought access to a much less traditional site—the interior of a military base. The Court viewed this site as quite distinct from a public street or a park, observing that "[i]t is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a

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80. The military regulation at issue in Greer v. Spock stated that permission to distribute a publication could be withheld only where "it appears that the dissemination of [the] publication presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation. . . ." Army Reg. 210-10, ¶ 5-5(c)(1970), *as cited in* Greer v. Spock, 424 U.S. at 831 n.2.

81. 424 U.S. 828, 840 (1976) (quoting Dept. of the Army, Guidance on Dissent §§ 5(a)(1), 5(a)(3) (June 23, 1969)).

82. 407 U.S. at 198.

public forum."[83] In addition, because the literature distribution restriction also before the Court was limited to protecting against potential interference with the administration of the military, the Court treated the regulation as an effort to protect against a harm to military operations rather than as an effort to regulate content.

The *Spock* Court employed the lowest level of scrutiny that could be used in reviewing a governmental restriction on communication activities. The regulations were presumed to be necessary to protect against harm to the state interests identified by the military administrators. As in the courthouse and jail grounds cases, the Court required no evidence that the speech activities in question would actually inflict harm. In fact, the scrutiny was even lower than in those cases because the *Spock* Court presumed the need for imposing restrictions despite the fact that the "non-partisan" restrictions excluded entire categories of speech.[84]

The comparative ease with which the *Spock* Court selected the exceedingly low level of scrutiny ultimately employed is never fully explained in its short, rhetorical opinion. Aside from distinguishing the interior of a military base from a public street, the Court's opinion does little more than invoke platitudes about the traditional function of a military base and the importance of a politically neutral military.[85] However, in so doing it implies an element that, although not mentioned, may have influenced the outcome of the case: the Court's singular lack of expertise concerning the administration of the military. A decision to void the restrictions at issue in the case would have substituted the views of judges for those of military administrators. Absent a clear indication of censorship, the majority of the Court may not have been willing to second-guess the administrative decisions which led to the promulgation of the regulations.[86] This deference to administrative decisions is an element which was made clearer in a trio of prison cases.

5. *Inside prisons.* During the mid-1970s, the Supreme Court handed down three important cases addressing the validity

83. 424 U.S. at 838.

84. *See supra* note 80.

85. 424 U.S. at 837-38.

86. For a similar view of the military installation cases see Brest, *The Supreme Court, 1975 Term, Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 156 (1976).

of restrictions on communications inside prisons.[87] These cases highlight the relation of the level of judicial scrutiny to the observable potential for censorship or oppressive restrictions and the presumed reliability of non-discriminatory decision making. In deciding these cases, the Supreme Court employed divergent levels of scrutiny in a fashion parallel to that in the military cases. This time, however, the Court was more articulate about its reasons. The most active scrutiny was reserved for review of a restriction on inmate correspondence that lacked clear, content-neutral standards. In two other cases, the Court employed minimal levels of scrutiny in assessing restrictions on communications framed to preserve prison discipline. In fact, scrutiny was so low in these latter cases, that it approached a standard of no scrutiny at all.

The first case in which the court assessed the validity of restrictions on communication in a prison setting was *Procunier v. Martinez*.[88] In an opinion written by Justice Powell, the Court invalidated prison regulations which prohibited inmates from sending letters that "unduly complain," "magnify grievances," or express "inflammatory political, racial, religious or other views or beliefs."[89] In so doing, the Court invoked the high level of scrutiny that it routinely had applied to provisions lacking sufficiently clear standards to prevent the use of administrative power to engage in censorship. The reason was obvious: "These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for mail censorship."[90]

Justice Powell was quite careful, however, to point out that the high standard of scrutiny the Court was applying to the mail regulations would not be applied to prison restrictions more directly related to safeguarding prison discipline. In dictum, he made clear that the Court viewed prison administrators' discretion as so worthy of enormous deference that a powerful presumption protecting that discretion existed: "[P]rison administrators may [not]

87. *See infra*, notes 93, 97, 101 and accompanying text.

88. 416 U.S. 396 (1974).

89. *Id.* at 399-400. In portions of the opinion not treated by this Article, the Court invalidated a ban against the practice of law students and legal paraprofessionals conducting interviews of inmates on behalf of the inmates' attorneys. The Court rested this ruling on "the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their consitutional rights." *Id.* at 419.

90. *Id.* at 415.

be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty."[91]

One year later, in *Pell v. Procunier*,[92] Justice Powell's dictum became the basis for decision. In *Pell* the Court upheld a prison regulation banning reporters from conducting inmate interviews in California prisons. The ban was found to be appropriate for two reasons. First, in the Court's view, prisons were not the equivalent of public forums.[93] Second, the opinion stated that the special character of prisons obliged the judiciary to presume the reliability of decision making by prison officials.[94] A narrow exception to this presumption arose when a challenger to a regulation could produce substantial proof that it was unnecessary. "[S]ecurity considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of s2ubstantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[95]

The broad dimensions of the Court's inclination to presume that prison administrators' judgments are reliable was reemphasized a few years later in *Jones v. North Carolina Prisoners Union*.[96] There the Court upheld regulations banning meetings, bulk mailings, and membership solicitations made in the course of efforts to organize a prisoners' union. The Court addressed the case in the same fashion it had addressed *Pell*. A need was presumed for the regulation without putting any burden on the state to show that prison operations would be harmed in its absence.

The strength of the Court's presumption was indicated when it articulated the rationale for its decision to uphold the regulations as "appropriate deference to the decisions of prison administrators."[97] It is noteworthy that the regulations were specifically

91. *Id.* at 414.
92. 417 U.S. 817 (1974).
93. *Id.* at 826-27.
94. *Id.* at 827.
95. *Id.*
96. 433 U.S. 119 (1977).
97. *Id.* at 125.

directed at restricting the contents of prisoner communication—the dissemination of communications relating to formation of an inmate union.[98] This presented a contrast with the *Tinker* Court's approval of armbands which was accompanied by a rejection of regulations directed at prohibiting a specific idea.[99] Here the Court recognized that restrictions on communications about a prisoners' union constituted content discrimination and nonetheless approved the restriction. Moreover, the Court required no justification other than the fact that prison officials had determined the content restrictions to be necessary:

> First Amendment associational rights, while perhaps more directly implicated by the regulatory prohibitions, likewise must give way to the reasonable considerations of penal management. As already noted, numerous associational rights are necessarily curtailed by the realities of confinement. They may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment. As we noted in *Pell v. Procunier*, . . . "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."[100]

The reasons for the high level of scrutiny of the standardless mail regulation in *Martinez*, the first of the prison censorship cases, is quite clear. The situation was a familiar one for the Court. The regulation lacked specifically articulated limits on official discretion capable of preventing censorship of inmate mail by zealous prison officials. The presumption of invalidity so readily applied to standardless restrictions[101] was thus carried into the context of prison mail censorship. The Court could see no justification for making an exception to the established doctrine that vesting standardless discretion in an official with power to censor particular documents was potentially too damaging to the flow of communication to be permitted.[102] Moreover, if the state interest was significant enough, clearly drafted regulatory standards could still be formulated to protect state interests without encouraging censorship.

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98. *Id.* at 131-32.
99. *See supra* notes 59-72 and accompanying text.
100. 433 U.S. at 132 (quoting *Pell*, 417 U.S. at 823).
101. *See supra* notes 29-38 and accompanying text.
102. 416 U.S. at 407-14.

The reasons for the low level of scrutiny in *Pell* and *Jones*, cases which involved, respectively, regulations governing press interviews, and regulations restricting the formation of a prisoners' union, are twofold: First, the Supreme Court concluded that a prison—a closed institution—was not a public forum akin to streets and parks and, therefore, was not subject to all of the constitutional doctrines governing such sites.[103] Second, and much more importantly, where prison discipline and administration were involved, the Court was not nearly as willing to substitute its judgment for that of prison officials.[104] In fact, the Court was so wary of involving itself in the tough and unpredictable realm of prison administration that in the absence of evidence of invidious motives, it was prepared to assume the necessity for selectively regulating the content of specified communications, regardless of the fact that such regulation seemed as close to censorship as the ban on antiwar armbands in *Tinker*.[105]

6. *Teachers' mailboxes.* During the 1982 term, the Court handed down a decision which again demonstrated its strong inclinations to defer to administrators' judgments. In *Perry Education Association v. Perry Local Educators' Association*,[106] it sustained the validity of provisions of a collective bargaining agreement between a school board and a public employees' union which gave the union exclusive access to teacher mailboxes at the district's schools.[107] The agreement had been challenged by a rival, unrecog-

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103. 433 U.S. at 134.

104. 417 U.S. at 827.

105. The Court has repeatedly shown its inclination to reduce the level of scrutiny ordinarily used in reviewing standardless regulations governing the substance of communications in special settings where regulators have special administrative expertise. The Court is uneasy about voiding restrictions which grant broad discretion to regulators who must operate complex and volatile institutions. In Brown v. Glines, 444 U.S. 348 (1980), the Court upheld a military prohibition against circulating petitions among military personnel to gather signatures for Congress. "While members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and the military mission requires a different application of those protections.'" *Id.* at 354 (quoting Parker v. Levy, 417 U.S. 733, 758 (1974)). "Because the right to command and the duty to obey must be unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline." *Brown*, 444 U.S. at 357. Jones v. North Carolina Prisoners Union, 433 U.S. 119 (1977), applied a similarly permissive approach to review content regulations in the prison setting.

106. 103 S.Ct. 948 (1983).

107. A previous case, United States Postal Service v. Greenburgh Civic Assns., 453 U.S. 114 (1981), addressed the question of whether residential mailboxes were public forums for

nized union on grounds that it cut the rival off from access to the teachers via the important route of school mailboxes. The rival union unsuccessfully contended that it was the victim of discrimination because the mailboxes were a public forum and because the recognized union and groups like the local cub scouts had been given access to the boxes.

Although the majority opinion by Justice White focused on analysis which concluded that teachers' mailboxes were not a public forum, deference to the judgment of officials concerned with the complex problems of labor relations seemed to be central to the outcome. In Justice White's words: "We have previously noted that the 'designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones.' "[108] Although he did not say so explicitly, he rather clearly implied that the majority felt it lacked the ability to make judgments which were superior to those of the participants to the labor contract and therefore preferred not to subject the contested provision of the contract to a high level of scrutiny.

In fact, the extraordinarily low level of scrutiny was highlighted by the Court's unquestioning acceptance of the school board's claim that exclusion of the rival union was necessary "to prevent the District's schools from becoming a battlefield for inter-union squabbles."[109] There was contrary evidence in the record which was largely ignored. The Court's refusal to consider evidence addressed to the question of whether the restriction was really necessary was treated in a single, conclusory statement relegated to a footnote: "We have not required that such proof be present to justify the denial of access to a non-public forum on grounds that the

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purposes of distribution of unstamped leaflets and circulars. The Court held that they were not. The procedural peculiarities of that litigation preclude an identification of the level of scrutiny employed by the Court. It reviewed the case after a trial on the merits during which substantial evidence to support the exclusion of unstamped material from mailboxes was introduced by the government.

108. 103 S.Ct. at 958-59 (quoting from Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 (1977)).

109. 103 S.Ct. at 948, 959 (quoting from *Haukvedahl v. School District No. 108*, No. 75c-3641 (N.D. Ill. 1976)).

proposed use may disrupt the property's intended function."[110]

D. *Integrating the Cases into a Continuum: A Judicial Preference for Lower Levels of Scrutiny*

The previous discussion indicates that the level of scrutiny in public forum cases varies according to the characteristics of each case.[111] If, from a perusal of the circumstances of a particular case,

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110. 103 S.Ct. at 959 n.12.

111. *Perry Educ. Ass'n.* stated that there are three categories of forums:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.
>
> A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.
>
> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

103 S.Ct. at 954-55 (citations omitted).

The Court's identification of these categories of forums suggest that there are only three discrete levels of judicial scrutiny. However, this is somewhat misleading. There is nothing inherent in the categories to indicate when one site will be treated differently from another. Under the categories, regulators can exclude a particular speech activity from designated forums when the activity is inconsistent with the forum's primary function, just as they can exclude speakers from nonpublic forums whose activities are inconsistent with its intended

the Supreme Court concludes that officials might be acting as censors because of official distaste for the ideas communicated, the level of scrutiny is quite high. If the circumstances indicate a minimal likelihood that the regulator is acting like a censor and if there are indications he or she is attempting to discharge purely regulatory functions, then the level of scrutiny is much lower. Judicial scrutiny all but disappears when the Court concludes that there are limited indications of censorship and the administrator is an expert who is regulating a closed institution with volatile or extremely complex administrative problems.

Thus, in the review of standardless permit laws, the Court has presumed that such discretion would be applied to censor ideas. Using the high level of scrutiny implicit in such a presumption, the Court has routinely invalidated such laws. Similarly, when public officials have attempted to exclude specific ideas from discourse in a setting where discourse is to be expected, the Court has shown a high degree of distrust of official justifications by presuming them insufficient unless supported by some indication of actual harm to state interests. Thus, in *Tinker*, when public officials sought specifically to exclude antiwar ideas from the schools, the Court imposed a level of scrutiny that required evidentiary support of official justifications.[112] When the restriction has amounted to a flat ban on access to commonly used forums like streets and parks, the burden on speech has been viewed as sufficient to require judicial inquiry into whether official justifications and decisions were trustworthy or whether less intrusive alternatives were available.[113]

In typical cases upholding forum restrictions, judicial scrutiny has usually remained at minimal levels. Those cases have generally been characterized by non-discriminatory, content-neutral restrictions which are not so broad as to isolate totally the speaker from his audience. In such cases, the Court has presumed the necessity of the restrictions without proof of need from the state. Thus in *Adderly v. Florida*,[114] the Court upheld the sheriff's decision to ex-

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function. *Id.* at 955 & n.7. Therefore, the only way to ascertain the differences in the judiciary's treatment of the official decisions governing each site is to determine from the character of the forum whether the Court is likely to view its own judgment or that of the forum regulator as more trustworthy.

112. *See supra* text accompanying note 65.

113. *See supra* text accompanying note 48.

114. *See supra* note 55 and accompanying text.

clude demonstrations from grounds adjacent to a jail because there was no suggestion of censorship. The Court apparently felt it could trust the reliability of the sheriff's decision because he appeared to have no motive to act arbitrarily. Similarly, in *Cox II*[115] the Court upheld a ban on courthouse demonstrations and accepted the legislative judgment that all demonstrations near courthouses were harmful to judicial proceedings. This was undoubtedly because nothing in the facts indicated that the legislative judgment was not to be trusted.

The judiciary's willingness to presume the trustworthiness or reliability of official decision making renders *Heffron* far more understandable. The upholding of restrictions on Krishna leafletting, literature sales, and fund solicitations, without evidence to show that these activities would disrupt competing state interests, is characteristic of the Supreme Court's prior treatment of content-neutral restrictions. The restriction on the Krishnas' activities was non-discriminatory. The restriction was enforced for a purpose unrelated to content. Because alternative means of communication remained, the Court was satisfied that it was not tantamount to a flat ban.

The Court's willingness to employ such a low level of scrutiny appears to rest on the majority's view that the restriction in question was the product of an inherently trustworthy administrative decision. Apparently the Court felt that because the restriction was not based on the content or subject matter of Krishna speech and since it facilitated crowd control without completely excluding the Krishnas from the fairgrounds, it could be assumed that the regulators had struck a sound balance between competing interests. This is precisely the assumption that appears to have been made in previously decided public forum cases employing a low level of scrutiny.

The majority's assumption seems arbitrary because the record clearly suggested that the restriction was broader than necessary. It prevented leafletting while allowing proselytizing, which appeared to have the same or greater capacity to hinder the flow of pedestrians. The overreach of the restriction was rather graphically illustrated by Justice Brennan's characterization of the dilemma confronting the Krishnas:

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115. *See supra* note 50.

> All share the identical right to move peripatetically and speak freely through the fairgrounds.
>
> Because of Rule 6.05, however, as soon as a proselytizing member of ISKCON hands out a free copy of the Bhagavad-Gita to an interested listener, or a political candidate distributes his campaign brochure to a potential voter, he becomes subject to arrest and removal from the fairgrounds.[116]

The constitutional significance of this overreach is underscored by the fact that the leafletting prohibited by fair officials has traditionally been a mode of communication accorded special treatment by the Court. In *Schneider*, the Court had rejected a flat ban on leafletting in public streets and parks, characterizing pamphlets as historic weapons in the defense of liberty.[117] In *Martin v. Struthers*,[118] the Court had voided a prohibition against ringing doorbells to deliver leaflets because "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."[119] It could be argued that the *Heffron* Court's prohibition of leafletting and simultaneous expression of tolerance for proselytizing was justified. Indeed, enforcement of a ban on proselytizing might have been seen by fair officials as too costly and annoying to fairgoers because it would have required policing of individual conversations. However, the record's silence on the subject suggests that such a justification did not come easily enough to the state for its inclusion as part of the state's case in the trial court. Thus, it seems fair to surmise that the state found the inconsistency as difficult to justify as the concurring and dissenting justices did.

The apparent inconsistency in banning a leafletting while allowing oral proselytizing could also be seen as comparatively unimportant. It could be viewed as a solitary instance in which the mistaken presumption was made that a particular restriction was necessary. However, closer examination suggests that the apparent inconsistency in *Heffron* is probably a product of a more systematic phenomenon. The inconsistency appears to be a consequence of the Court's routine employment of a low level of scrutiny in review of most content-neutral forum restrictions. Such scrutiny has the consequence of freeing forum regulators to formulate and en-

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116. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 659-60 (1981) (Brennan, J. concurring and dissenting).

117. 308 U.S. 147, 162 (1939).

118. 319 U.S. 141 (1943).

119. *Id.* at 146.

force a broad range of potentially unnecessary restrictions without fear of significant judicial review.

Underlying the low level of scrutiny applied to the typical time, place, and manner cases, then, is the judicial assumption that, in the absence of evidence to the contrary, official regulatory decisions are inherently trustworthy. They are assumed to be sound accommodations of the conflict between speech interests and regulatory interests.[120] This assumption is examined in the concluding sections of this Article. These sections examine the actual incentives governing official decision making. The analysis demonstrates that the Court makes an important error when it assumes that forum regulators make rational, balanced decisions in all cases except those in which discrimination is evident, or a flat ban is imposed.

II. Erroneous Behaviorial Assumptions Underlying the Lower Levels of Scrutiny in Public Forum Cases

Central to the time, place, and manner doctrine is the Supreme Court's desire to neutralize incentives that regulators have to censor communication because of their disapproval of its content.[121] At the same time, the Court has recognized the necessity for content-neutral restrictions that preserve essential functioning of the conventional public services and activities of citizens that can be disrupted by communication activities in public places. By employing lower levels of scrutiny in so many public forum cases, the Court has reached its outcome in those cases by assuming that regulatory decision making is trustworthy most of the time. Unfortunately, in making this assumption, the Court has failed to recognize the high frequency of circumstances in which public officials have strong incentives to overregulate, even though they intend no censorship and though no actual interference with public services or activities is present or imminent. These incentives appear in cases in which there is an undifferentiated apprehension that

120. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 537 (1934): "With the wisdom of the [economic] policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." For an insight into judicial decision making as a product of the judicial assessment of the comparative skills of various institutional decisionmakers, see Komesar, *In Search of General Approach of Legal Analysis: A Comparative Institutional Alternative*, 79 Mich. L. Rev. 1350, 1383-90 (1981).

121. *See supra* notes 28-41 and accompanying text.

speech activities have the potential to generate significant law enforcement problems and high administrative expenses.

The incentive of regulators to impose unnecessary content-neutral restrictions probably comes from two sources. First, there is the tendency of forum regulators to be disproportionately sensitive to threats of disruptions of public services and routine activities of the citizenry. Second, forum regulators tend to be particularly sensitive toward protecting public services and routine activities of the citizenry when the communication is controversial or is of interest to only a small segment of the population.

A. *Disproportionate Sensitivity to Regulatory Interests*

The tangible pressures on public officials to be attentive to the protection of state regulatory concerns, such as maintenance of order, protection of traffic flow, and protection of public services are quite strong.[122] Failure to pay adequate attention to such regulatory needs can result in immediate disruptions of routine community activities. There is even a risk of severe disorder. For example, a public assembly in the middle of a major downtown intersection during rush hour has an immediate and tangible, if not catastrophic, impact on automobile traffic. Similarly, two parades at the same time and in the same place will generate confusion with unpredictable and potentially dangerous consequences. The possibility of such easily observable and dramatic occurrences inevitably produces powerful incentives for officials to exercise great care. Administrators are vulnerable to strong criticism and may even face discharge if their regulatory efforts are insufficient.

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122. This observation is based both on analysis and the observations of the author, who, during the course of public forum litigation, has had occasion to question public officials about their regulatory decisions. *See, e.g.*, Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972), and Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978). *See also* Jaffee, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973), in which the author contends that, when there is broad administrative discretion, administrative decisions are determined by several elements, including:

> [T]he intensity of a given problem, the degree to which it is felt throughout an organized and stable constituency, and the representation (or lack thereof) of varying interests within and without the lawmaking body. The significance of each of these elements and the manner of their interaction are unpredictable, and likely to vary with each successive problem. Often the outcome will be determined not by the abstract merits of a situation, but by the character of certain interests which are cohesive and vociferous.

Id. at 1188.

By comparison, the countervailing pressures on administrators to protect speech are much less compelling. The interest in maximizing communication opportunities is an intangible one. The absence of the benefit of a given communication is not felt in the same way that the inconvenience of a traffic jam is felt. If someone does not hear an idea because a permit to speak is arbitrarily denied, he is not likely to know that he has missed anything; if there is a traffic jam on a very busy street, many people are likely to become extremely frustrated. Similarly, if regulators require that a demonstration be moved to a less desirable location, comparatively few people are likely to become agitated.[123] Thus, more people are likely to be strongly and immediately affected by a disruption of routine by state functions than are likely to be inconvenienced by a loss of an opportunity to communicate. Moreover, because supporters of an overregulated demonstration are usually comparatively few in number, they are not even likely to have enough political "clout" to pressure forum regulators to be more responsive to speech interests.

B. *Disproportionate Sensitivity to Controversial Communication*

If the most serious criticism that could be made of minimal scrutiny is that it insulates official tendencies to impose unnecessary restriction, then it might arguably be a tolerable one. One could make the intuitively plausible assumption that a bias toward regulatory interests falls on all ideas evenly; thus, it would not appear to have a significant impact on the mix of ideas in the so-called marketplace of ideas.[124] However, the ultimate impact of relaxed scrutiny on the content of communication is not nearly as even-handed as this intuitive reaction might suggest.[125] Forum administrators have incentives to watch with particular care for speech activities that seem most likely to cause trouble. When they identify such activities, they presumably regulate them most aggressively. The impact of this incentive is neither content nor view-

123. *See, e.g.*, Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667 (N.D. Ill. 1976), which prohibited the city of Chicago from denying a permit for a parade by a small number of blacks through an extremely hostile white neighborhood.

124. *See* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101-02 (1978).

125. *See* Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130-31 (1981).

point-neutral.

Since controversy frequently triggers strong emotional reactions, it has a unique capacity to generate risks of civil disorder.[126] It can generate violent retaliatory responses from members of the audience hostile to the message. It may also provoke unpredictable behavior among sympathetic listeners. For example, it is easy to imagine a demonstration to protest police brutality in which individual members of the crowd react spontaneously to criticism of police by throwing objects at nearby police officers detailed to direct traffic. Commentators on the behavior of administrative agencies suggest that forum regulators are likely to act aggressively to minimize the risk of such trouble.[127] Some believe that rather than ignoring risks of trouble, administrators are inclined to act aggressively to avoid those risks. For example, according to Professor James A. Wilson: "That agencies are risk averse does not mean that they are timid. Quite the contrary: their desire for autonomy, for a stable environment, and for freedom for (sic) blame gives these agencies a strong incentive to make rules and to exercise authority in all aspects of their missions."[128]

The regulatory response to the threats of trouble inherent in controversy is likely to be an aggressive imposition of restrictions on any communication activities perceived as having controversial content. Because controversial communication by its nature is capable of generating hostile response or other regulatory problems, it becomes a kind of risk index for forum regulators who are structuring a regulatory response to a given public assembly. When the subject of the assembly seems quite controversial, intensive regulatory efforts can be expected to assure order is maintained. For example, the scheduling of a demonstration by a group of self-styled Nazis in a downtown area of any community inevitably invites an

126. This special ability of controversial issues to engender a particularized reaction in its audience was a paramount consideration in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), which upheld a transit authority's policy of selling advertising space on its vehicles for commercial advertisements that excluded political and public issue advertising.

127. *See generally*, THE POLITICS OF REGULATION (J. Wilson ed. 1980). *See also* Blasi, *Prior Restrictions on Demonstrations*, 68 MICH. L. REV. 1482, 1514 (1970) (concluding that forum regulators tend to exaggerate the threat of trouble). Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 50 (1981) (under conditions of uncertainty regarding consequences, both regulatory officials and judges tend to overestimate the dangers of controversial speech).

128. *The Politics of Regulation*, *supra* note 131, at 377.

aggressive regulatory response from officials responsible for making sure no trouble occurs.[129]

For a number of reasons, including those previously discussed, it would also seem to be very likely that the regulatory response will be disproportionate. Prior to a controversial demonstration, officials must guess the magnitude of the threat of potential trouble. If they underestimate the potential, they may be faced with public disorder or property damage. The risk of disorder, dramatic disruption, and political outcry is likely to be even greater than with communications in general. The chance of countervailing political pressure is smaller. Here, the constituency for speech and assembly is often a controversial minority. Thus, the inevitable tendency is to overregulate.[130] If there is overregulation, public response is unlikely to be particularly significant. On the other hand, if there is underregulation and trouble follows, serious criticism may result, even to the point of jeopardizing the regulator's job.

An example of administrative overreaction to controversy appears in *Tinker*.[131] As has previously been discussed,[132] the school officials asserted that they were afraid that the ideas expressed by the anti-war armbands would trigger a strong, hostile response from unsympathetic students. As a consequence, they attempted to exclude the armbands from school premises. The likelihood that this particular exclusion constituted an overreaction by officials was indicated because on previous occasions, other extremely provocative communications had been allowed which did not generate disruptions.

Tinker is distinct from more routine regulatory cases such as *Heffron* because the school officials never attempted to conceal their desire to exclude a specific idea from the school setting.[133] On the contrary, they identified the idea and explained that they thought its expression would have a harmful impact on the educational environment. Presumably, because the Court was able to identify the school administrators' decision as a possible overreac-

129. *See* D. HAMLIN, THE NAZI/SKOKIE CONFLICT (1980); *see also* N.Y. Times, July 10, 1978, at A14, col. 1 (account of a rally by self-styled Nazis held in downtown Chicago).

130. For a discussion of analogous regulatory behavior in the context of decision making in the federal government, see Quirk, *Food and Drug Administration*, in THE POLITICS OF REGULATION 191, 234 (J. Wilson ed. 1980).

131. 393 U.S. 503 (1969).

132. *See supra* notes 59-72 and accompanying text.

133. 393 U.S. at 511.

tion to a controversial idea, it felt compelled to employ a higher level of judicial scrutiny.[134]

On the other hand, the Court's reaction to a ban on state courthouse demonstrations in *Cox II* ignored a situation in which the suppression of provocative speech, although not intentional, was potentially just as serious. In *Cox II*, courthouse demonstrations were banned because it was assumed that demonstrators who articulated a position on the conduct of state judicial proceedings would have a serious impact on such proceedings. The state legislature's desire to avoid this impact was so strong that it enacted a restriction which banned virtually all courthouse demonstrations, even those which would have no undesirable effects on judicial proceedings. Both the Court and the legislature were willing to presume that *all* demonstrations near courthouses would have an intolerable impact on judicial proceedings no matter what the circumstances.[135]

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134. For a contrary view of *Tinker*, defending the latitude of school officials to control communications as they deem necessary without judicial intervention, see Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981).

135. Cox v. Louisiana, 379 U.S. 559 (1965). *Cox II* might mistakenly be interpreted as a case where the Court viewed itself as having a special knowledge about the problems of judicial administration and was, therefore, capable of making an independent judgment. The better view, however, identifies the case as one where the Court deferred to the legislature's determination that such demonstrations should be prohibited. The probability that judicial deference controlled the outcome is even greater in light of the fact that the statutory ban at issue was so broad that it reached non-disruptive demonstrations whose proximity to a courthouse might only create the mistaken public impression that they were influencing judicial proceedings. Regardless of what actually motivated the Court to decide as it did, this author views the level of scrutiny as minimal because the Court presumed harm where none might exist, rather than requiring it to be proven.

The Court's most recent decision regarding courthouse demonstrations, United States v. Grace, 103 S.Ct. 1702 (1983), supports the view that *Cox II* was an example of judicial deference to legislative policy. In *Grace*, the Court held that a federal statute prohibiting leafletting or picketing in the United States Supreme Court Building or on its grounds was unconstitutional as applied to activities which took place on public sidewalks outside the Court building. While the holding might seem inconsistent with the Court's approval of the regulation at issue in *Cox II*, *Grace* should be recognized as a case where the Court made an independent judgment and found that a presumption of harm to judicial administration was inappropriate. Perhaps the Court felt justified in making this independent judgment because the members were all intimately familiar with the Court's building, its relationship to the adjacent sidewalk, and the scant potential for harm to appellate proceedings posed by nearby speech activities.

In *Cox II*, the Court refrained from making such an independent judgment. There the Court was willing to defer to the state legislature's judgment, perhaps because the affected courts were trial courts—vulnerable to disturbances by nearby public demonstrations. Seen

Similarly, in *Perry Education Association v. Perry Local Educator's Association*[136] the Court appeared to approve state action which was largely motivated by a desire to avoid competition between competing unions. There, as we have seen, the Court upheld a provision of a collective bargaining agreement which gave exclusive teacher mailbox access to the recognized union. The state claimed that exclusion from access of a rival union was necessary to prevent the schools from becoming a "battlefield" of inter-union rivalry. The Court accepted this claim in spite of the fact that there was evidence indicating that simultaneous access by both unions on previous occasions had not created any problems. Had the Court insisted on a provable threat of disruption, the record suggests that the Court might well have been forced to conclude that the provision was unnecessary.

Examples of the great potential for administrative overreaction to controversy appear in reported lower court opinions as well. For example, in *We've Carried the Rich v. City of Philadelphia,*[137] city officials denied a permit to a group seeking to hold a counterdemonstration in close proximity to Philadelphia's bicentennial celebration.[138] The celebration was to be held in the downtown area, but city officials offered the counterdemonstrators permits for undesirable, if not inhospitable, neighborhood locations far from the downtown area as possible sites for such a demonstration.

In a decision adopting the city's preference for an expansive band of geographic separation between the bicentennial activities and the proposed counterdemonstration, the district court employed reasoning suggestive of the thinking of city officials:

> The influx of hundreds of thousands of people and thousands of vehicles into the bicentennial area on July 4th will present traffic and crowd control problems of the greatest magnitude. The additional burden of providing for plaintiffs' groups on a separate march route in the impacted area may prove insurmountable. Even peripheral contact between the two groups of marchers

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in this light, the two cases are not necessarily incompatible.

136. 103 S. Ct. 948 (1983).

137. 414 F. Supp. 611 (E.D. Pa. 1976).

138. *Id.* at 612-13. *See also* discussion of a police officer's suspicions about demonstrators whom he viewed as "outsiders." Tatum v. Morton, 402 F. Supp. 719, 721-22 (D.D.C. 1974); *see also* Lipez, *The Law of Demonstrations: The Demonstrators, The Police, The Courts*, 44 DEN. L.J. 499, 508-09 (1967) (public demonstrations require more sensitive police handling).

and/or spectators can cause confusion and affect the orderly progress of the parades.

Furthermore, I cannot overlook the fact that the vast majority of the people that day will be exercising First Amendment Rights by attending and participating in the officially sponsored activities. It seems to me that they ought to be free to do so without fear of interference from those who wish to promote an opposing view.

Moreover, in light of the plaintiffs' militant attitude and provocative posture as exemplified in their broadside, common sense dictates that the two parades should be kept separate in order to avoid any untoward incident which would trigger a confrontation and disrupt the peaceful activities of either or both groups.[139]

These risks sound significant, almost awesome, until one realizes that there is no indication that either the city or the court made a concrete inquiry into the risks actually posed by permitting the counterdemonstration to be located in closer proximity to the main demonstration. There seems to be a great deal of reliance on intuitive feelings about the inherent risk of a counterdemonstration, but there is no parallel examination of the importance of the counterdemonstrators' entitlement to reach their audience.[140]

III. A Proposed Change In Judicial Review

The foregoing sections of this Article have focused on two phenomena. First, they have identified the circumstances and policy rationales underlying the use of low levels of judicial scrutiny. Second, they have examined the strong motivations of forum regulators to overregulate in an effort to avoid risks of trouble. These phenomena combine to insulate overly restrictive forum regulations from judicial review. So long as a forum restriction and surrounding circumstances do not suggest intentional censorship or are not so burdensome as to deny all audience access, it is unlikely to be overturned by judicial decision. Thus, in *Heffron*, fairground administrators, nervous about the potential of any activity to disrupt fairgoers, were free to construct any plausible restriction on peripatetic communications whether or not it was actually neces-

139. 414 F. Supp. at 613-14 (citations omitted).

140. For a case deciding a similar issue but employing a higher level of scrutiny, see Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667 (N.D. Ill. 1976) (black demonstrators entitled to parade through hostile white community even though city officials believed that residents in the neighborhood would try to interfere forcibly with the parade).

sary. Minimal judicial scrutiny assured that their efforts would be likely to withstand legal attack.

To the extent that minimal scrutiny is responsible for insulating systematic overprotection of regulatory interests and underprotection of speech, a modification would seem in order. Speech interests are generally regarded as being so important that threats of censorship are routinely given maximum scrutiny by the judiciary. Moreover, controversy is generally regarded as the category of communication most worthy of judicial protection.[141] To the extent that a low level of scrutiny allows officials to ignore these policy priorities, it seems inconsistent with the basic framework of first amendment jurisprudence.

The difficult question is how to modify judicial review of forum restrictions to achieve less skewed results. Some commentators suggest that there should simply be a uniformly high level of judicial scrutiny in all speech regulation cases.[142] They would abandon the content distinction. This approach ignores the importance of tailoring judicial review to the peculiarities of different kinds of cases. The Supreme Court has not merely chosen between a high level of scrutiny and a low level of scrutiny. This Article identifies several levels of scrutiny that are presently employed.[143] They range from the presumptive unconstitutionality of standardless laws to the almost total deference to judgments of prison, military and school officials. To argue for a uniform level of scrutiny asks the Court to forego intermediate and lower levels of scrutiny in individual cases when those levels of scrutiny may be all that is required to assure that sound regulatory judgments have been made.

One modification that might be considered would be an exten-

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141. See the discussion in Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

142. *See, e.g.*, Redish, *supra* note 129, at 142-51.

143. The different levels of scrutiny are exemplified by the following cases: Lovell v. City of Griffin, 303 U.S. 44 (1938) (standardless law irrebuttably presumed unconstitutional); Tinker v. Des Moines Ind. School Dist. 393 U.S. 503 (1969) (discrimination against particular idea in absence of factual showing of justification by government); Schneider v. State, 308 U.S. 147 (1939) (flat ban on speech balanced against competing state interests without need of supporting evidence from either side); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) (content-neutral regulation of access presumed valid unless speaker presents evidence of content discrimination); Jones v. North Carolina Prisoners Union, 433 U.S. 119 (1977) (restrictions on content permissible in the context of highly specialized governmental operations like prisons).

sion of the "least restrictive means" approach to review of cases in which forum restrictions containing clear standards are applied. This approach is suggested by the Court's discussion in *Schneider v. State*,[144] finding a ban on all leafletting to be an impermissible way to prevent littering. The *Schneider* Court evaluated the need for the ban in light of alternative means that might have been employed to prevent littering. Such a level of scrutiny has the theoretical appeal of triggering an evaluative process that actively takes available alternatives into account. Such an inquiry, earnestly made, would presumably facilitate the identification and rejection of restrictions that are unnecessary.

However, there is a problem with the "least restrictive means" approach. Because it is largely based on the subjective assessment of the viability of alternative ways to solve the same problem, it is basically unstable. Each case employing such a standard turns on a judicial assessment of the comparative merits of various alternatives without the benefit of an evidentiary record showing the actual impact of each alternative. Thus, the outcome of such analysis turns in large measure on judicial speculation.

It seems preferable to increase the level of scrutiny in public forum cases by linking judicial decision making to an evidentiary showing. Such an approach would have two consequences. First, it would reduce judicial decision making based on speculation about the effects of particular forum restrictions. Second, it would encourage more reliable regulatory decision making by providing incentives to ground forum restrictions on an evidentiary base that could withstand increased judicial scrutiny. Ultimately, the approach would offset incentives toward overregulation by limiting selection of forum restrictions to those that could be objectively justified.

This approach does not significantly depart from the existing framework of public forum decisions. In *Tinker*, the Court employed such an approach when reviewing a restriction that it feared might be used to impose censorship.[145] In order to minimize speculation in administrative decision making, the Court specified the evidentiary showing necessary to justify a restriction. In addition, it placed the burden of justification on the shoulders of school

144. 308 U.S. 147 (1939).
145. 393 U.S. 503 (1969).

officials in order to avoid regulatory decisions based solely on an "undifferentiated fear or apprehension of disturbance."[146]

A circumstance somewhat similar to the one that *Tinker* sought to remedy is posed by the systematic propensity of forum regulators to overprotect regulatory interests at the expense of all speech, particularly controversial speech. Because of an "undifferentiated fear or apprehension" of the risk of a disturbance or other difficulty, forum regulators fail to carefully and neutrally balance competing interests. As a means to offset the tendency of forum regulators to overregulate speech activities, employment of the evidentiary approach used in *Tinker* would seem to be effective. Such an approach would replace the routine presumption that plausible forum restrictions are sound accommodations of competing interests with a requirement that forum regulations be supported by an appropriate showing of need. This would move the regulatory process toward more even-handed outcomes and away from tendencies toward overreaction that otherwise characterize regulatory decision making.

There are, of course, problems with increasing the level of judicial scrutiny by extending *Tinker* to more routine regulatory decisions. One of the most important of these problems is that any increase in the level of scrutiny is likely to generate increased litigation. This is because a high level of scrutiny decreases the certainty that forum regulators will prevail by increasing the possibility of successful court challenges to their decisions. Simply put, forum users and their lawyers are likely to be sensitive to the increased potential for successful litigation that increased judicial scrutiny brings. Consequently, they are likely to file more lawsuits.

Increased litigation would place an increased burden on forum administrators in several ways. It would require the commitment of more time and money to the regulatory process. Administrators would have to make decisions and keep records with a careful eye toward the possibility of litigation. Thus, they would undoubtedly find themselves making paper trails to support their regulatory decisions by generating otherwise unnecessary documents that could serve as objective evidence in the event of a lawsuit.

Increasing the level of scrutiny in public forum cases would also increase the cost of deciding those cases for the judiciary. To

146. *Id.* at 508.

the extent that increased scrutiny of a public forum decision generates the filing of additional cases, there will be proportionately more time that would have to be spent by the judiciary in deciding them. In addition, more time would also have to be spent on each case tried or reviewed. More careful evaluation of government justifications for forum restrictions requires a more extensive review of evidence. Both the increase in the number of cases and the increase in reliance on evidence would require that the judiciary use resources that are already in comparatively short supply.[147]

Whether the benefit of increased judicial scrutiny is worth the cost is basically a restatement of the policy question asking whether speech interests should receive special constitutional protection or should be subject to the judgment of forum regulators. The care which the Supreme Court has taken in developing the time, place, and manner doctrine as a judicial tool for minimizing arbitrary restrictions suggests that it is inclined toward the view that constitutional policies favoring protection of speech should override countervailing cost considerations. Indeed, the Court has, on occasion, explicitly indicated that judicial review of forum restrictions must "weigh heavily the fact that communication is involved."[148] However, the Court's language notwithstanding, its predisposition toward employing minimal levels of scrutiny in routine cases suggests strong reluctance to incur the additional costs inherent in more active judicial review.

An application of the *Tinker* approach to the record in *Heffron* suggests that while increased scrutiny may impose increased litigation costs, they will not necessarily be excessive. The *Heffron* Court upheld a restriction confining all political and religious leafletting, literature sales, and religious fundraising to a fixed location by presuming the soundness of the regulation even though it allowed peripatetic oral proselytizing. It could have increased the level of scrutiny by placing a burden on state fair officials to prove

147. The increased cost of litigation created by an enlarged number of cases filed is to be distinguished from the increased cost created by the need for additional judicial resources in order to decide each case. A higher level of judicial scrutiny would increase the number of cases filed because protectors would see a greater number of circumstances in which a lawsuit challenging a forum restriction would be successful. The need for additional judicial resources in each case would arise because the court would require evidence from the parties more frequently, and would need additional time to hear and review that evidence.

148. Grayned v. Rockford, 408 U.S. 104, 116 (1972).

that the activities regulated were as disruptive to crowd control as claimed. Such proof might have come in the form of expert affidavits or the testimony from experts or persons who witnessed the effects of Krishna religious activities at the fair.

In light of the existing record, a heavy burden on fair officials might well have required the Court to invalidate the application of the fairground restrictions to the Krishnas. There was no evidence that their activities would have actually interfered with crowd control. Nor is there any indication that there was evidence available that would have enabled the showing to be made. The apparently arbitrary regulatory decision to prefer proselytizing over leafletting, suggests that no evidence showed that leafletting was particularly disruptive. The absence of evidence of disruption from literature sales and fund solicitation similarly suggests that these restrictions might have been unnecessary. Placement of an evidentiary burden on the state would have tested the accuracy of each of these possibilities.

Had the Court required such evidence, it is unlikely that the contours of the litigation would have been altered radically. If additional evidence had been submitted in the form of affidavits, the increase in resources necessary to litigate and decide the case in all likelihood would have been minor. The preparation and analysis of such documents is usually one of the less time consuming aspects of litigation. If the additional evidence had been in the form of live testimony, more lawyer and judicial time might have been required to present and decide the case. Even so, the additional trial time would probably not have been particularly significant. Evidence pertaining to crowd disruption would have required the state to present a few experts and perhaps some occurrence witnesses in support of its case. Because most available experts are likely to be state regulatory and law enforcement officials who regularly deal with such problems, the state has near-monopoly of expertise and experience with crowd control problems, the Krishnas' response would have largely been confined to cross-examination of state witnesses. Thus, while there would have been some increase in the cost of proceedings to create an evidentiary record, it does not seem inordinate. In addition, it would have conferred the benefit of assuring that official decision making was not purely speculative or intuitive.

The closest that the Court has come to employing an approach

similar to that used in *Tinker* was the recent case of *United States v. Grace*.[149] In that case, the Court held that a federal statute prohibiting the "display [of] any flag, banner or device designed or adapted to bring into public notice any party, organization, or movement" in the United States Supreme Court Building or on its grounds including adjacent public sidewalks could not be constitutionally applied to picketing on the public sidewalks. The Court refused to assume the soundness of the legislative judgment underlying the statute. Instead, it looked to the record for palpable evidence of harm and concluded that "[t]here is no suggestion . . . that appellees' activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds."[150]

Unfortunately, it is doubtful that the *Grace* decision signifies a shift in the Court's approach to reviewing public forum cases. In *Grace*, automatic deference to the legislature's judgment would have been unlikely due to the special features of the case. The members of the Court worked in the building which the statute protected. They were personally familiar with the premises, the sidewalks, and any possible effects of speech activities on their deliberations. In light of their specialized knowledge, the Court's information about the issue was far more complete than the legislature's.[151]

CONCLUSION

The foregoing discussion has shown that in public forum cases where there are no obvious indications of censorship, the Court has tended to defer to regulatory judgments of forum regulators wherever possible. This has occurred because the Court has assumed that officials who were not obviously censoring were probably making regulatory decisions which reflected a sound balance of regulatory and speech interests. This assumption is incorrect. Regulatory officials are risk avoiders just like everyone else, and are therefore inclined to restrict speech activities whenever they become apprehensive that trouble might occur, however remote the possibility.

149. United States v. Grace, 103 S. Ct. 1702 (1983).
150. *Id.* at 1709, citing 40 U.S.C. § 13k (1976).
151. *See supra* note 135 (explaining that *Grace* does not overrule *Cox II*).

The Court's deference to official judgments insulates most regulatory decisions from significant judicial scrutiny and thereby allows and probably encourages decision making which unnecessarily burdens speech activities.

The obvious remedy is to increase scrutiny in a fashion that more carefully links specific factual considerations to judicial decision making and minimizes opportunities for speculation. Such an approach would tend to stabilize decision making in a way that will result in implementation of fewer unnecessary public forum restrictions. It would also insure that the constitutional interests in maximizing speech opportunities and minimizing unnecessary constraints on controversial speech are given the weight to which they are entitled.